Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL JOSEPH LESSARD, DOROTHY ELAINE LESSARD, MONICA JEAN LESSARD, and JEANNE MARIA LESSARD,

Petitioners,

vs.

VELSICOL CHEMICAL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Thirteenth Court Of Appeals For Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the trial court violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution in dismissing a plaintiff's lawsuit for want of prosecution notwithstanding the fact that the plaintiff's counsel requested a docket control conference for the purpose of scheduling a trial setting in writing on two separate occasions prior to the dismissal?

2. Did the trial court violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution by failing to conduct a hearing on the plaintiff's motion to reinstate their lawsuit after it had been dismissed?

PARTIES TO THE PROCEEDING

Petitioners, Michael Joseph Lessard, Dorothy Elaine Lessard, Monica Jean Lessard, and Jeanne Maria Lessard were plaintiffs in the Texas state trial court, appellants in the Texas court of appeals, and petitioners in the Texas Supreme Court.

Respondent, Velsicol Chemical Corporation, was one of several defendants in the trial court, appellant in the appeals court, and respondent in the Texas Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioners seek this Court's review of the opinion issued by the Texas Thirteenth Court of Appeals on April 23, 2009, App. 1-25, respectfully showing as follows:

OPINION AND JUDGMENT BELOW

This matter arises out of a personal-injury and property-damage lawsuit that was filed in a Texas state court and which invoked Texas substantive law. The lawsuit was dismissed for *want of prosecution* following a hearing on a jointly filed defense motion to dismiss for want of prosecution.[1] After the case was dismissed notwithstanding two written requests for scheduling a trial setting, the plaintiffs filed a verified motion to reinstate it pursuant to Texas Rule of Civil Procedure 165a(3), but the trial court denied this motion[2] and never conducted an oral hearing on it.

Petitioners timely appealed to the Texas Thirteenth Court of Appeals in Corpus Christi, which in written opinion dated April 23, 2009, affirmed the trial court's dismissal.[3] The Court of Appeals thereafter denied a timely filed motion for rehearing. The

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[1] App. 26-28 (District Court's order dismissing plaintiffs' claims, Nov. 17, 1999).

[2] CR 269-569.

[3] App. 1-25, *Lessard v. Velsicol Chemical Corp.*, 2009 WL 1089362 (Tex. App. – Corpus Christi 2009, pet. denied).

Texas Supreme Court denied a petition for discretionary review on September 11, 2009, and denied a timely filed motion for rehearing on January 15, 2010.[4] This Petition follows.

STATEMENT OF JURISDICTION

The Texas Supreme Court denied a petition for discretionary review of the Thirteenth Court of Appeals's decision on September 11, 2009[5] and thereafter denied a timely filed motion for rehearing on January 15, 2010.[6] The U.S. Supreme Court thus possesses jurisdiction under 28 U.S.C. § 1257(a), because this Petition was filed within 90 days of the Texas Supreme Court's disposition of a timely filed motion for rehearing. 28 U.S.C. §1257(a); *see* SUP. CT. RULE 13(1) (a petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review); *see also* SUP. CT. RULE 13(3) (if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties runs from the date of the denial of the petition for rehearing).

[4] App. 29; App. 30.

[5] App. 29.

[6] App. 30.

CONSTITUTIONAL PROVISION INVOLVED

Section (1) of the Fourteenth Amendment to the United States Constitution provides:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 210 (1958) (" . . . there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. . . .") (citing Fifth Amendment concerns).

FACTUAL BACKGROUND AND STATEMENT OF THE CASE

Petitioners, the Lessard family, filed this suit for personal injury and property damages against Velsicol Chemical Corporation and other defendants

in December of 1990.[7] Originally, the dispute involved numerous parties both on the plaintiffs' and defendants' sides of the docket; most of the parties eventually settled their claims, however, leaving only the Lessard family and Velsicol as parties.[8]

The Lessard family alleged that the defendants produced products including Gold Crest C-100 Emulsifiable Concentrate which contaminated their residence located in George West, Texas.[9] Suit was filed in the 343rd District Court of Live Oak County, Texas, on December 31, 1990.[10] In December 1991, similar claims brought by other plaintiffs against the same group of defendants were consolidated into one cause.[11]

After some discovery was had, the trial court in 1993 ordered the parties to select a visiting judge for trial.[12] The parties could not agree on a visiting judge, however, and the trial court retained the case. In 1994, all parties asked for a continuance of a May 1994 trial setting on grounds that the trial court

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[7] App. 3.

[8] App. 3.

[9] App. 3.

[10] App. 3; CR 581-595.

[11] App. 3; CR at 645-659; 287-302 (Plaintiffs' 1st and 2nd Amended Petitions).

[12] App. 4; CR 348.

discovery was incomplete.[13] The trial court granted the jointly requested continuance.

In 1997, the claims of some plaintiffs – but not those of Petitioners – were resolved for value at mediation.

On March 2, 1999, Plaintiffs'/Petitioners' counsel wrote to the district court coordinator requesting a conference to schedule a trial setting.[14] On March 14, 1999, Plaintiffs'/Petitioners' counsel filed a motion requesting the trial court to set a docket control conference by telephone for the purpose of scheduling a trial date.[15] A telephone scheduling conference was held with the trial court on March 23, 1999, at which time the district judge refused to set the case for trial but instructed the parties to agree on a visiting judge to try the case.[16] The parties could not agree on a suitable candidate, however. The trial court did not appoint a visiting judge but instead entertained defendants' motions to dismiss.

On October 19, 1999, Defendant Velsicol moved to dismiss the Plaintiffs' claims for want of prosecution.[17] Plaintiffs responded to this motion. Following a hearing, the trial court dismissed the plaintiffs'

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[13] App. 4; CR 350-354.

[14] CR 308-309.

[15] App. 4-5.

[16] CR 311-315; 317-319; 321-322.

[17] App. 5; CR 324-332.

claims with prejudice by order of dismissal dated November 17, 1999. App. 26-28. "The Lessards renewed their request for a trial setting at the November 17, 1999 hearing and in their motion to reinstate." App. 21, fn. 9.

On December 16, 1999, Plaintiffs filed a verified motion to reinstate pursuant to Rule 165a(3), but it was denied.[18] The trial court did not conduct an oral hearing on the motion to reinstate, and denied it. The Lessards did not request a separate hearing on their motion to reinstate.

Plaintiffs timely appealed to the Thirteenth Court of Appeals, which in a memorandum opinion dated April 23, 2009, affirmed the judgment of the 343rd District Court. App. 1-25, *Lessard v. Velsicol Chemical Corp.*, 2009 WL 1089362 (Tex. App. – Corpus Christi 2009, pet. denied). The Court of Appeals thereafter denied a timely filed motion for rehearing without opinion.

The Texas Supreme Court denied a petition for discretionary review, and thereafter, denied a timely filed motion for rehearing.[19]

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[18] CR 269-569.

[19] App. 29; App. 30.

REASONS FOR GRANTING WRIT

The trial court violated Petitioners' right to Due Process of Law under the Fourteenth Amendment to the United States Constitution by dismissing their case for want of prosecution and in not conducting a hearing in order to consider their request for reinstatement. The Constitutional infirmities that warrant the writ of certiorari are two-fold.

First, the dismissal of Petitioners' case for *want of prosecution* notwithstanding the fact that Petitioners' attorney wrote the district clerk and filed a motion *explicitly requesting* a docket control conference to schedule a trial date, constitutes a clear Due Process violation. It also constitutes a denial of Petitioners' right to a jury trial. When a plaintiff explicitly requests a trial yet his case is dismissed simply because it has been on the docket nine years, his Constitutional right to Due Process of law has been trampled.

Second, the trial court's failure to hold a hearing on the Petitioners' motion to reinstate – *i.e.*, its failure to conduct a hearing apart from the hearing that was held on the Defendants' motion to dismiss for want of prosecution – further violates Petitioners' Due Process rights because the Texas state court failed to comply with state directives on the subject. *See* TEX. R. CIV. P. 165a ("The clerk shall deliver a copy of the motion to the judge, who *shall set a hearing on the motion* as soon as practicable. *The court shall notify all parties or their attorneys of record of*

the date, time and place of the hearing. The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.") (emphasis added).

A. U.S. Constitutional issues have been preserved

The Lessards raised federal Constitutional Due Process of law issues on several occasions while their case was pending in the Texas state courts. For example, page 3 of the Lessards' Reply Brief in the Texas Thirteenth Court of Appeals says: "The trial court's failure to give proper notice deprived the Lessards of due process under the 14th Amendment of the U.S. Constitution and due course of law under article 1, section 19 of the Texas Constitution." The plaintiffs' assertion of Constitutional issues is further reflected by the fact that the opinion of the Thirteenth Court of Appeals addresses due process concerns.[20] Additionally, the Lessards' third issue for review presented to the Texas Supreme Court reads: "Whether a Court of Appeals may constitutionally affirm a dismissal of a lawsuit for want of prosecution, and affirm the denial of a motion to reinstate a lawsuit, based on an implied finding of fact, especially when it did not

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[20] App. 14-15.

conduct an oral hearing on the motion to reinstate." The Constitutional issue has been properly preserved for review.

B. Constitutional Protections relevant in this case

The Fourteenth Amendment of the United States Constitution protects against deprivation of life, liberty, or property by the State without due process of law. U.S. CONST. amend. XIV, § 1. Property interests within the ambit of the Fourteenth Amendment are not created by the Constitution, but rather "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Paul v. Davis*, 424 U.S. 693, 709 (1976). For example, when a litigant in a Texas state court is not afforded notice of pending litigation, and that lack of notice results in the deprivation of one of the litigant's significant interests – life, liberty or property – a state court judgment may be reversed as being in violation of the Fourteenth Amendment. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86-87 (1988). Similarly, a trial court's outright dismissal of a lawsuit as a form of sanction clearly raises due process of law concerns. *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767 n. 14 (1980) ("The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers."); *see further Societe Internationale*, 357 U.S. at 210 (" . . . there are

constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. . . ."). In short, "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Anderson National Bank v. Luckett*, 321 U.S. 233, 246 (1944).

C. Constitutional violations at issue

1. Dismissal for want of prosecution notwithstanding a request for a trial setting

This is a case in which the plaintiffs' lawyer specifically requested a trial setting from the trial court in writing. Twice. Unable to agree with defendants on a suitable visiting judge, the plaintiffs' counsel wrote the district court coordinator on March 2, 1999, requesting a conference to schedule a trial setting.[21] Additionally, on March 14, 1999, the plaintiffs filed a motion with the trial court requesting a docket control conference by telephone in order to schedule a trial setting.[22] Both of these requests are documented. Nevertheless, the trial court never set the case for trial or, failing that, never unilaterally appointed a visiting judge to break the parties' disagreement. The

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[21] CR 308-309.

[22] App. 5.

trial judge's decision did not enumerate a rationale for dismissal. Rather than select a judge or decide the case itself, the trial court looked for an out. It unilaterally blamed the plaintiffs for not agreeing on a visiting (substitute) judge.

Moreover, when challenged with a motion to dismiss, "The Lessards renewed their request for a trial setting at the November 17, 1999 hearing and in their motion to reinstate." App. 21, fn. 9. As such, the case was absolutely ineligible for dismissal for *want of prosecution*. Plaintiffs repeatedly requested a trial setting. Even, assuming *arguendo*, the case was not sufficiently factually developed (which is not true), this conclusion could only be the surmise of the defendants. Plaintiffs' counsel said that it stood ready to proceed through his requests for a trial setting. These requests were made before the hearings on the motion to dismiss. The lower courts violated the Due Process clause in dismissing the case for want of prosecution and affirming that decision based on this record.

The Thirteenth Court of Appeals affirmed the dismissal on "*an implied finding* that the Lessards did not prosecute this case with diligence." App. 20 (emphasis added). Indeed, the appellate opinion mentions several times that the case was nine years old when it was dismissed. The age of the case is misleading. While it is true the case was filed in December 1990, it initially included several defendants and several plaintiffs and there were never long periods of unexplained inactivity. Four years after the case was

filed (*i.e.*, in May 1994), the *defendants* filed joint motions for continuance, telling the trial court that discovery was incomplete and *they* (*i.e.*, the defendants) sought more time.[23] In 1997, claims of other plaintiffs – the Episcopal Church and the Reynolds family – were settled for value at a mediation. In 1999, the Lessards asked the trial court to set their unresolved claim for trial.

Given these facts, the Court of Appeals's statement that, "Nearly nine years elapsed between the date the case was first filed – December 31, 1990 – and the date the trial court finally dismissed it – November 17, 1999" is technically accurate but misleading. It does not support the dismissal. A detached look at the record shows that the parties attempted to mediate in mid-1997, and when that failed, the plaintiffs requested trial settings in March 1999. Portraying this as a case that sat dormant for nine years is inaccurate.

Regardless of the case's history prior to 1999 and regardless of counsel's statements at the November 1999 hearing about the prior history of the case, by March of 1999, the plaintiffs were not stalling or begging for a continuance. Instead, they wanted a trial setting and said so. They: (a) wrote a letter requesting a docket scheduling conference and (b) filed a motion

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[23] *See, e.g.*, CR 324-332 and CR at 174-177 ("All parties to this action agree that additional time is required for discovery and join in this motion.").

requesting the same thing. They renewed this request when the defendants' motion to dismiss was heard in November 1999. Plaintiffs expressly asked for a trial setting, belying any notion that the case had not been diligently prosecuted. The Court of Appeals' affirmance of the dismissal based on an *implied finding* of prior periods of non-diligence violated plaintiffs' Constitutional rights to a trial by jury and to due process of law.

Given their several requests for a trial setting, plaintiffs cannot fairly be charged with failing to prosecute their case. While this Court has wisely observed that, "the authority of a trial court to dismiss a plaintiff's action with prejudice because of his *failure to prosecute* cannot seriously be doubted, and that the power to invoke this sanction is necessary in order to prevent undue delays and avoid congestion" – *Link v. Wabash R. Co.*, 370 U.S. 626, 629-30 (1962) (emphasis added) – the facts of this case simply do not amount to a "want of prosecution" or "failure to prosecute." If the trial court wished to punish the parties for not being able to select an alternative judge, it should have simply appointed one, or at least so stated. It did not.

Due process of law requires a reinstatement of the Lessards' case under these facts.

2. Failure to hold a separate hearing on the motion to reinstate

As stated by the opinion of the Thirteenth Court of Appeals (App. 24, fn. 10), the trial court conducted a hearing on Velsicol's joint motion to dismiss, but not the Lessards' verified motion to reinstate. This omission ran afoul of Texas procedural rules, which explicitly require one. TEX. R. CIV. P. 165a(3) (a trial court is compelled to reinstate a case "upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained."). The Texas Supreme Court has held that when a verified motion to reinstate has been filed under rule 165a(3), an oral hearing is required, and a failure to hold such a hearing requires reversal. *See Thordson v. City of Houston,* 815 S.W.2d 550, 550 (Tex.1991) (*per curiam*).

The Lessards did not explicitly request a hearing on their verified motion to reinstate. The Court of Appeals relied on this fact to conclude that the lack of a hearing had been waived. One Texas intermediate court, however, has held that the absence of a request for a hearing on a motion to reinstate has no bearing on whether a hearing should be held; even absent a request, a hearing must be held in obedience to the rule. *See, e.g., Matheson v. American Carbonics*, 867 S.W.2d 146, 147-48 (Tex. App. – Texarkana 1993, no writ) ("[T]he court is required to conduct a hearing on a timely filed motion to reinstate. Whether or not the

movant requests a hearing on a motion to reinstate is irrelevant; a hearing is required unless waived.") (internal citations omitted). This result also squares with the unambiguous text of Texas Rule of Civil Procedure 165a, which requires the trial court set a hearing.

The Due Process Clause provides that a hearing is an important component of procedural due process, and the failure to conduct a hearing in obedience to established norms – such as state statute or decisional law – is an offending factor. *See, e.g., Societe Internationale*, 357 U.S. at 210 (" . . . there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. . . ."), citing *Hovey v. Elliott*, 167 U.S. 409, 413-14 (1897) and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-51 (1909). The trial court's failure to set a hearing in obedience to the State of Texas's guidelines (*i.e.*, the requirements set forth in Texas Rule of Civil Procedure 165a) constitutes a violation of procedural due process and warrants a remand for further proceedings on the merits of this case.

CONCLUSION

The trial court's dismissal of the Lessard family's lawsuit for want of prosecution and its refusal to reinstate it violated the Fourteenth Amendment's Due Process clause. The Thirteenth Court of Appeals erred in affirming the dismissal.

Unable to agree on proposed candidates for a visiting judge, the plaintiffs' counsel requested a trial setting in writing – twice – from the trial court. The record reflects the Lessards sought a trial and explicitly so advised the trial court. The trial judge failed to appoint a visiting judge and failed to set the case for trial before himself, thus denying the plaintiffs procedural due process. The record shows there was no unexplained period of inactivity. After dismissing the case, the trial court failed to hold a hearing on the plaintiffs' motion to reinstate. The Thirteenth Court of Appeals erred in affirming the trial court's dismissal under these facts.

Petitioners request that this Court grant this Petition for Certiorari, and upon consideration, reverse the decision of the Thirteenth Court of Appeals and remand the cause for further proceedings on the merits. Petitioners pray for all relief to which they are justly entitled.

Respectfully submitted,

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Not Reported in S.W.3d, 2009 WL 1089362 (Tex. App. – Corpus Christi)

Court of Appeals of Texas,
Corpus Christi-Edinburg.
Michael Joseph LESSARD, Dorothy Elaine Lessard, Monica Jean Lessard, and Jeannie Marie Lessard, Appellants,
v.
VELSICOL CHEMICAL CORPORATION, Appellee.

No. 13-00-00113-CV.
April 23, 2009.
Rehearing Overruled June 11, 2009.

Trial court did not abuse its discretion when it dismissed chemical contamination claims for want of prosecution as proper notice was given. The property owners argued that they did not receive adequate notice of the trial court's intent to dismiss their case because the notice was promulgated by the chemical corporation via its joint motion to dismiss for want of prosecution and not by the trial court itself. They argued that the chemical corporation's joint motion was only sufficient to inform them of the corporation's intentions and gave no indication of the trial court's intentions. However, the Texas Supreme Court has held that *either* notice of the trial court's intent to dismiss or notice of the actual order of dismissal is sufficient notice.

On appeal from the 343rd District Court of Live Oak County, Texas, Alonzo Torres Rodriguez, Judge.

Francis I. Spagnoletti, J. Robert McKissick, Spagnoletti & Associates, James T. Liston, Houston, for appellants.

Earl B. Austin, Melissa J. Armstrong, Tyler Murray, Baker & Botts, Dallas, for appellee.

Before Chief Justice VALDEZ and Justices GARZA and VELA.

MEMORANDUM OPINION

Memorandum Opinion by Justice GARZA.

Appellants, Michael Joseph Lessard, Dorothy Elaine Lessard, Monica Jean Lessard, and Jeannie Marie Lessard, appeal from the trial court's granting of a motion to dismiss for want of prosecution in favor of appellee, Velsicol Chemical Corporation ("Velsicol").[1]

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[1] The record reflects that the following parties were once part of this appeal as appellees: Savage Pest Control; Leslie Savage Bowles, individually and as the executor of the estate of James S. Savage, deceased; Charyle M. Merritt, Sammey Allison Merritt; the unknown heirs of James S. Savage; James S. Savage d/b/a Savage Pest Control; Robert D. Nogueria, individually and as executor of the estate of James S. Savage (collectively the "Savage parties"). In fact, the Savage parties jointly filed with Velsicol the motion to dismiss for want of prosecution complained about on appeal. This Court, on June 8, 2000, issued an order dismissing the appeal as to the Savage parties because the Savage parties and the Lessards had settled their claims. As a result, this Court severed the Lessards' claims as to the Savage parties into a separate appellate cause number – 13-00-349-CV – and dismissed the appeal. The Lessards' remaining

(Continued on following page)

By two issues, the Lessards argue that the trial court abused its discretion: (1) in dismissing their claims for want of prosecution; and (2) in refusing to reinstate their claims pursuant to Texas Rule of Civil Procedure 165a(3). *See* TEX.R. CIV. P. 165a(3). We affirm.

I. BACKGROUND

This dispute involves damages arising from the chemical contamination of several residences in Live Oak County, Texas. Originally, the dispute involved numerous parties; however, most of the parties have settled their claims, leaving only the Lessards, Velsicol, and Fruit of the Loom as parties.

The Lessards filed their original petition on December 31, 1990, alleging, among other things, that Velsicol and Fruit of the Loom were negligent in designing, manufacturing, and marketing Gold Crest C-100 Emulsifiable Concentrate, the chemical which allegedly contaminated the Lessards' residence. The Lessards' lawsuit was one of three lawsuits against the same set of defendants-trial court cause numbers 7202-C (filed by the Episcopal Church Corporation of West Texas), 7205-C (filed by the Reynolds family), and 7214-C (filed by the Lessard family). The trial court consolidated the three lawsuits on December 16, 1991.

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issues against Velsicol remained docketed under the current appellate cause number – 13-00-113-CV.

On June 24, 1993, the trial court ordered that all further proceedings and the trial of the matter were to be conducted before a visiting judge. The trial court further ordered the parties to "agree upon the identity of a visiting judge within ten days from the date of this Order." The parties never agreed on which visiting judge would conduct further proceedings.

On April 22, 1994, all of the parties agreed to a joint motion to continue the upcoming May 23, 1994 trial setting, which the trial court granted. Velsicol, Fruit of the Loom, and the Savage parties filed a motion for the appointment of a visiting judge on July 28, 1994, requesting that the trial court appoint a visiting judge since the Lessards and the other plaintiffs had rejected each of the proposed visiting judges named on the defendants' list without offering a list of their own. The record does not reflect that the trial court ruled on this motion.

On February 28, 1997, the trial court entered an agreed order of referral appointing Steven W. Fieldcamp as the mediator for the claims.[2] After mediation in 1997, Velsicol, Fruit of the Loom, and the other defendants settled with the plaintiffs in

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[2] By signing the February 28, 1997 agreed order of referral, the trial court ostensibly denied the July 28, 1994 motion for the appointment of a visiting judge filed by Velsicol, Fruit of the Loom, and the Savage parties.

trial court cause numbers 7202-C and 7205-C, leaving only the Lessards' claims unresolved.

On March 14, 1999, the Lessards filed a motion with the trial court requesting the trial court to set a docket control conference by telephone for the purpose of scheduling a trial date. The trial court set the docket control conference for March 23, 1999, and sent notice to the parties. It is not clear from the record before us when the new trial setting was scheduled.

Nevertheless, on October 19, 1999, Velsicol and the Savage parties filed a joint motion to dismiss the Lessards' claims for want of prosecution. In this filing, Velsicol and the Savage parties argued that they had provided the Lessards with lists of visiting judges on numerous occasions and that the Lessards failed to do anything. Velsicol and the Savage parties also alleged that the case had been outstanding for nine years at the time of filing and that the Lessards were "the only outstanding claims despite mediation attempts and numerous letters sent to the Plaintiffs on behalf of the Defendants to obtain a visiting judge."

On November 12, 1999, the Lessards filed a response to the joint motion to dismiss for want of prosecution. The Lessards alleged that a jury trial of their claims would only take a week and requested a trial setting for the first available week after February 2000. Counsel for the Lessards noted that he was recently employed by the law firm of

Spagnoletti & Associates for the specific purpose of prosecuting this matter, and he subsequently proposed a new list of visiting judges and, alternatively, suggested that the trial court select a visiting judge if Velsicol and the Savage parties objected to his list of visiting judges. Nowhere in the response did counsel for the Lessards explain why the case had been delayed for over nine years.

On November 17, 1999, the trial court conducted a hearing on Velsicol and the Savage parties' joint motion to dismiss. At the hearing, counsel for the Savage parties noted that this matter would take more than one week to try and alleged that the Lessards had "basically sat on their hands for nine years in this case." Counsel for Velsicol stated that discovery in the case had not been updated since 1992 and that he was not afforded the opportunity to finish a deposition of the Lessards' expert witness. Velsicol's counsel also referenced a recent claim brought by the Lessards for damages associated with "painful, sensitive polyneuropathy" and that the Lessards had not participated in discovery regarding that claim. In explaining why the case had taken so long to prosecute, counsel for the Lessards noted the following:

> [Counsel for the Lessards]: All right. I have filed a response in this case. As I said, Your Honor, I originally represented the Lessards. I have been out of this case for five years. I've just been rehired. My first priority is to go forward with this case.

. . . .

[Counsel for the Lessards]: I left the law firm, Your Honor, and went into practice elsewhere. And in fact, I tried to retire from the practice of law first of the year and found out I just couldn't do that. And so Mr. Spagnoletti asked me to come back and clear up some cases including this one.

. . . .

[Counsel for the Lessards]: Now that I'm on the case, I'll see all that is done and I will do it expeditiously just as soon as it can possibly be done. And I'll see that it's done.

To correct what Counsel said, originally I represented the Lessards when I was with the Kleberg Law Firm in Corpus Christi. I have not been associated with this case. I turned this case over to Mr. Spagnoletti about four or five years ago. I haven't been associated with the case in the last three years.

I'm back here. I know the Lessards personally and I originally represented them and I would – just to have their day in court or get this thing concluded for them. And that's all I ask, Your Honor, and I will diligently do whatever this Court suggests or wants me to do with regards [sic] to resolving it, and that'll be done. I promise Your Honor that.

. . . .

> THE COURT: They never did move the cases when you left.
>
> [Counsel for the Lessards]: I know. I intend to move it now, Your Honor.

The trial court subsequently dismissed the Lessards' claims for want of prosecution.

On December 16, 1999, the Lessards filed various post-judgment motions, including a verified motion to reinstate, arguing that the trial court abused its discretion in dismissing the case and that rule 165a of the Texas Rules of Civil Procedure mandated reinstatement. *See* TEX.R. CIV. P. 165a. Included with their verified motion to reinstate was an affidavit executed by Francis I. Spagnoletti in which he stated the following:

> My firm has continuously represented Plaintiffs [the Lessards] since obtaining this case. The case was mediated in 1997, but no settlement could be reached. Although it is true that the case has now been on file for nine years (1990-1999), there are several reasons that explain this passage of time:
>
> > First, as is customary at my firm, I assigned this case to associates, who then prepare the case as necessary for trial, including propounding and responding to discovery, obtaining medical records, and consulting with expert witnesses. Over the years that this case has been on

> file, the handling associate changed on several occasions. This fact has resulted in an unintended delay in handling.
>
> Second, this case is a consolidation of three separate lawsuits with separate sets of plaintiffs (the Reynolds, the Lessard[s], and the Episcopal Church), and includes separate defendants which are separately represented. The claims of the Reynolds were finally settled after lengthy proceedings. . . .

On December 20, 1999, the Lessards filed their original notice of appeal, which they later supplemented on March 13, 2000. The trial court denied all of the Lessards' post-judgment motions on January 31, 2000. The trial court entered an amended order of dismissal on February 9, 2000, adding Fruit of the Loom to the list of defendants .[3] It is because of this alteration that the Lessards filed their supplemental notice of appeal on March 13, 2000.

On December 29, 1999, Fruit of the Loom filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. This Court was notified of Fruit of the Loom's bankruptcy filing on July 24, 2000. *See* TEX.R.APP. P. 8.1. On August 17, 2000, this Court stayed the Lessards' appeal pursuant to the automatic stay imposed by the

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[3] The Lessards did not name Fruit of the Loom as a party in their March 13, 2000 supplemental notice of appeal.

bankruptcy code. *See* 11 U.S.C. § 362(a). The Lessards filed a motion to reinstate their appeal on June 8, 2007, noting that the bankruptcy proceedings involving Fruit of the Loom had concluded on March 21, 2007. *See* TEX.R.APP. P. 8.3(a).[4] On June 28,

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[4] Rule 8.3(a) of the Texas Rules of Appellate Procedure provides the following:

> If a case has been suspended by a bankruptcy filing, a party may move that the appellate court reinstate the appeal if permitted by federal law or the bankruptcy court. If the bankruptcy court has lifted or terminated the stay, a certified copy of the order must be attached to the motion.

TEX.R.APP. P. 8.3(a). In the instant case, the Lessards included a copy of the status report from Fruit of the Loom's bankruptcy proceedings as compiled by the PACER Docket Service for the United States Bankruptcy Court for the District of Delaware with their motion to reinstate their appeal. This status report is not certified, but it does indicate that Fruit of the Loom's bankruptcy proceedings terminated on March 21, 2007, thereby demonstrating that the automatic stay is no longer in effect. Though the status report is not certified, we find that the Lessards substantially complied with the requirements of rule 8.3(a) of the rules of appellate procedure. *See id.; see also* TEX.R.APP. P. 8.3(b); *MCI Sales & Serv. v. Hinton*, No. 10-08-00353-CV, 2008 Tex.App. LEXIS 8200, at *1, 2008 WL 4742616 (Tex.App.-Waco Oct. 29, 2008, pet. filed) (mem.op.) (per curiam) ("[An appeal] may be reinstated on motion of any party showing that the stay has been lifted or modified and specifying what action, if any, is required from this Court upon reinstatement of the appeal."); *Ma-Stell, Inc. v. Anadarko E & P Co.*, Nos. 10-03-00358-CV & 10-05-00204-CV, 2005 Tex.App. LEXIS 3193, at *2 n. 3, 2005 WL 984785 (Tex.App.-Waco

(Continued on following page)

2007, we granted the Lessards' motion to reinstate their appeal. This appeal followed.

II. ANALYSIS

A. The Trial Court's Dismissal of the Lessard's Claims for Want of Prosecution

In their second issue, the Lessards argue that the trial court abused its discretion in exercising its inherent power to dismiss their case for want of prosecution. Specifically, the Lessards contend that: (1) the trial court failed to give them notice that it planned to dismiss their case for want of prosecution; and (2) the record demonstrates that they were diligent in trying to obtain a trial setting from the trial court. Velsicol counters by arguing that the Lessards received reasonable notice and were given an opportunity to be heard before the trial court dismissed their claims after being on file for nine years at the time of dismissal.

1. Standard of Review

We review a trial court's dismissal of a suit for want of prosecution under an abuse of discretion standard. *See MacGregor v. Rich,* 941 S.W.2d 74, 75

Apr. 27, 2005, order) (noting that rule 8.3(b) of the rules of appellate procedure provides that the appeals court may sever and reinstate on its own initiative).

(Tex.1997) (per curiam); *State v. Rotello,* 671 S.W.2d 507, 509 (Tex.1984); *see also Sewell Motor Co. v. Capitan Enters., Inc.,* No. 08-02-00454-CV, 2004 Tex.App. LEXIS 3577, at ___ 5-6, 2004 WL 868490 (Tex.App.-El Paso Apr. 22, 2004, pet. denied) (mem.op.). The trial court abuses its discretion when it acts without reference to any guiding rules or principles or if the action is arbitrary or unreasonable. *Koslow's v. Mackie,* 796 S.W.2d 700, 704 (Tex.1990); *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-42 (Tex.1985).

A trial court may dismiss a case for want of prosecution: (1) when a party fails to appear at a hearing or trial; (2) when the case has not been disposed of within the Supreme Court's time standards;[5] or (3) under the trial court's inherent power to dismiss, when the case has not been prosecuted with due diligence. *See* TEX.R. CIV. P. 165a; *Villarreal v. San Antonio Truck & Equip.,* 994 S.W.2d 628, 630 (Tex.1999); *Rotello,* 671 S.W.2d at 509; *Bilnoski v. Pizza Inn, Inc.,* 858 S.W.2d 55, 57 (Tex. App.-Houston [14th Dist.] 1993, no writ). The

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[5] Texas Rule of Judicial Administration 6(b) provides that all civil jury cases should be brought to trial or final disposition within eighteen months from appearance date and that all civil nonjury cases should be brought to trial or final disposition within twelve months from appearance date. TEX.R. JUD. ADMIN. 6(b). However, the supreme court "recognized that in especially complex cases or special circumstances it may not be possible to adhere to these standards." TEX.R. JUD. ADMIN. 6(c).

trial court's authority to dismiss is derived both from rule 165a of the Texas Rules of Civil Procedure and from its inherent power to manage its own docket. *Veterans' Land Bd. v. Williams,* 543 S.W.2d 89, 90 (Tex.1976); *Burton v. Hoffman,* 959 S.W.2d 351, 353 (Tex.App.-Austin 1998, no pet.).

When an unreasonable delay in the prosecution of a case occurs, it is presumed that the case has been abandoned. *Bilnoski,* 858 S.W.2d at 57 (citing *Hosey v. County of Victoria,* 832 S.W.2d 701, 704 (Tex.App.-Corpus Christi 1992, no writ)). If that delay is not sufficiently explained, the presumption of abandonment is conclusive and the case will be dismissed. *Id.* The trial court, in exercising its inherent authority, may consider periods of activity, intervals of inactivity, reasons for lack of attention, and the passage of time to determine whether the delay was reasonable. *Ozuna v. Sw. Bio-Clinical Labs.,* 766 S.W.2d 900, 902 (Tex.App.-San Antonio 1989, writ denied); *see King v. Holland,* 884 S.W.2d 231, 237 (Tex.App.-Corpus Christi 1994, writ denied) (noting that in exercising its inherent power to dismiss a case, a trial court may consider the length of time the case was on file, the extent of activity in the case, whether a trial setting was requested, and the existence of reasonable excuses for the delay). The Lessards did not request findings of fact or conclusions of law, and the trial court did not specify the standard of dismissal used; therefore, we must affirm the trial court's decision if any legal theory for the dismissal is supported by the record. *See Point Lookout W., Inc. v.*

Whorton, 742 S.W.2d 277, 278 (Tex.1987); *see also Maughan v. Employees Ret. Sys. of Tex.*, No. 03-07-00604-CV, 2008 Tex.App. LEXIS 5822, at *7, 2008 WL 2938867 (Tex.App.-Austin Aug. 1, 2008, no pet.) (mem.op.).

2. Discussion

The Lessards first argue that the trial court abused its discretion because it did not provide adequate notice of its intent to dismiss their case for want of prosecution. Texas Rule of Civil Procedure 165a(1) provides that a party must be provided with notice and an opportunity to be heard before a trial court may dismiss a case for want of prosecution under either rule 165a or its inherent power. *See* TEX.R. CIV. P. 165a(1) ("Notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney."); *Villarreal,* 994 S.W.2d at 630; *Dueitt v. Arrowhead Lakes Prop. Owners, Inc.,* 180 S.W.3d 733, 737 (Tex.App.-Waco 2005, pet. denied); *see also Callahan v. Staples,* 139 Tex. 8, 161 S.W.2d 489, 491 (1942) (requiring notice for dismissals under the court's inherent power); *Gutierrez v. Lone Star Nat'l Bank,* 960 S.W.2d 211, 214 (Tex.App.-Corpus Christi 1997, pet. denied) (requiring notice for dismissals under rule 165a). The requirements of notice and a hearing are necessary to ensure that the dismissed claimant received due process. *Dueitt,* 180 S.W.3d at 737 (citing *Smith v. McKee,* 145 S.W.3d 299, 302

(Tex.App.-Fort Worth 2004, no pet.); *Tex. Sting Ltd. v. R.B. Foods, Inc.*, 82 S.W.3d 644, 648 (Tex.App.-San Antonio 2002, pet. denied); *Franklin v. Sherman Indep. Sch. Dist.*, 53 S.W.3d 398, 401 (Tex.App.-Dallas 2001, pet. denied)). The failure to provide adequate notice of the trial court's intent to dismiss for want of prosecution is a due process violation and requires reversal. *Villarreal*, 994 S.W.2d at 630 (citing *Donnell v. Spring Sports, Inc.*, 920 S.W.2d 378, 386 (Tex.App.-Houston [1st Dist.] 1996, writ denied); *Davis v. Laredo Diesel, Inc.*, 611 S.W.2d 943, 946-47 (Tex.Civ.App.-Waco 1981, writ ref'd n.r.e.)); *see Keough v. Cyrus U.S.A., Inc.*, 204 S.W.3d 1, 5 (Tex.App.-Houston [14th Dist.] 2006, pet. denied). However, participation in a hearing on a motion to reinstate cures any due process concerns for the trial court's failure to provide notice of its intent to dismiss for want of prosecution. *Dueitt*, 180 S.W.3d at 737.

The Lessards argue that they did not receive adequate notice of the trial court's intent to dismiss their case because the notice was promulgated by Velsicol via its joint motion to dismiss for want of prosecution and not by the trial court itself. They argue that Velsicol's joint motion was only sufficient to inform the Lessards of Velsicol's intentions and gave no indication of the trial court's intentions. They further argue that Velsicol cannot give notice of the trial court's intention to dismiss the claims using its inherent power, but that the trial court must give notice of its own intentions.

However, several Texas courts have held that a dismissal for want of prosecution may be obtained by the motion of the trial court or on the motion of any party to the suit. *See Dueitt,* 180 S.W.3d at 738; *see also Sierra Club v. Tex. Comm'n on Envtl. Quality,* No. 03-04-00108-CV, 2005 Tex.App. LEXIS 454, at *5, 2005 WL 121869 (Tex.App.-Austin Jan. 21, 2005, no pet.) ("Contrary to appellants' arguments, the rule 165a reinstatement procedure applies to all dismissals for want of prosecution, regardless of whether they are initiated by the court or motion of a party."); *Polk v. St. Crossing Homeowners Ass'n,* 165 S.W.3d 89, 92-93 (Tex.App.-Houston [14th Dist.] 2005, pet. denied) (affirming the trial court's granting of appellee's motion to dismiss for want of prosecution); *Harvey v. Wetzel,* No. 03-03-00608-CV, 2004 Tex.App. LEXIS 6818, at *12, 2004 WL 1685879 (Tex.App.-Austin July 29, 2004, no pet.) (same); *Wright v. Tex. Dep't of Criminal Justice-Inst. Div.,* 137 S.W.3d 693, 694 (Tex.App.-Houston [1st Dist.] 2004, no pet.) (same); *Manning v. North,* 82 S.W.3d 706, 712 (Tex.App.-Amarillo 2002, no pet.) (same). Furthermore, the Texas Supreme Court has held that *either* notice of the trial court's intent to dismiss or notice of the actual order of dismissal is sufficient notice. *See Harris County v. Miller,* 576 S.W.2d 808, 810 (Tex.1979); *see Lowe v. U.S. Shoe Corp.,* 849 S.W.2d 888, 891 (Tex.App.-Houston [14th Dist.] 1993, writ denied).

Velsicol filed its joint motion to dismiss for want of prosecution on October 18, 1999, more than nine

years after the Lessards had first filed their lawsuit. In its joint motion, Velsicol noted the following:

> Trial was set for this case on January 9, 1995, in Live Oak County during a week that was not a jury week. In approximately late October of 1994, the Honorable Judge Rodriguez noted that there would not be an actual jury setting in the case nor a new docket control conference, unless and until the parties agreed to a visiting judge. Thereafter, the Defendants [Velsicol and others] on numerous occasions provided the Plaintiffs [the Lessards] lists of visiting judges, among which included, Judge Wells Stewart, Judge Vernon Harville, and the late Judge Onion. Despite the Defendants' efforts, the Plaintiffs failed to do anything.
>
> It has been nearly nine years since the filing of this suit. To date, all claims regarding the Defendants have been resolved with the exception of the claims set forth by the Lessards. The Lessards remain the only outstanding claims despite mediation attempts and numerous letters sent to the Plaintiffs on behalf of the Defendants to obtain a visiting judge.
>
> The Savage Defendants have made numerous efforts to resolve this claim and have heard no reply from the Plaintiffs. *To ensure that the interests of the Defendants are preserved and to reach a resolution in this long stalled case, the Defendants ask this Court to dismiss this matter for failure of the*

Plaintiffs to properly and efficiently pursue their case.

WHEREFORE PREMISES CONSIDERED the Defendants respectfully request the Court grant the Joint Motion to Dismiss for Want of Prosecution.

(Emphasis added.) On November 12, 1999, the Lessards filed a response to the joint motion to dismiss, alleging that the reason for the delay in the case was that the parties could not agree on a visiting judge and proposing a list of three visiting judges. On November 17, 1999, the trial court conducted a hearing on Velsicol's joint motion to dismiss. It is not clear from the record that the trial court notified the Lessards of its intent to dismiss their claims for want of prosecution. *See Alexander v. Lynda's Boutique,* 134 S.W.3d 845, 849-50 (Tex.2004) ("[M]ere silence as to whether notice [of intent to dismiss] was sent does not establish that notice was not sent. . . ."); *see also Keough,* 204 S.W.3d at 5. In any event, after hearing arguments from Velsicol, the Savage parties, and the Lessards, the trial court granted Velsicol's joint motion to dismiss for want of prosecution.

All that due process requires is that a party be given notice of the time and substance of the hearing, and an opportunity to present arguments at the hearing. *See Smith,* 145 S.W.3d at 302; *Tex. Sting Ltd.,* 82 S.W.3d at 648; *see also Dueitt,* 180 S.W.3d at 739. Velsicol's joint motion to dismiss put the Lessards on notice that their claims may be dismissed for want of prosecution by the trial court.

See Dueitt, 180 S.W.3d at 740 (holding that "'a dismissal notice containing no reference to Rule 165a or the court's inherent authority [is] sufficient to put the appellant on notice that the court could dismiss under Rule 165a(1), Rule 165a(2), or its inherent authority'" (quoting *Steward v. Colonial Cas. Ins. Co.,* 143 S.W.3d 161, 163-64 (Tex.App.-Waco 2004, no pet.))). By conducting the November 17, 1999 hearing, the trial court afforded the Lessards an opportunity to be heard and to provide adequate justifications for the nine-year delay in prosecuting the case. *See Lowe,* 849 S.W.2d at 891 ("It is generally held that a party to a lawsuit is charged with notice that the suit may be dismissed for want of prosecution when there is inaction for a long period of time. This constructive notice satisfies due process requirements.") (internal citation omitted). Thus, we conclude that the Lessards received due process.[6] *See Dueitt,* 180 S.W.3d at 740; *see also Bilnoski,* 858 S.W.2d at 57; *Lowe,* 849 S.W.2d at 891.

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[6] Our conclusion is further supported by the fact that the Lessards were provided a copy of the actual dismissal order, which allowed them to timely file their motion to reinstate. *See* TEX.R. CIV. P. 165a(3) (providing that a motion to reinstate must be filed within thirty days after the order of dismissal is signed or within the period prescribed by Rule 306a); *see also Harris County v. Miller,* 576 S.W.2d 808, 810 (Tex.1979) (holding that *either* notice of the trial court's intent to dismiss or notice of the actual order of dismissal is sufficient notice); *Lowe v. U.S. Shoe Corp.,* 849 S.W.2d 888, 891 (Tex.App.-Houston [14th Dist.] 1993, writ denied) (same).

Next, the Lessards contend that the record demonstrates that they were diligent in prosecuting their claims; therefore, the trial court abused its discretion in granting Velsicol's joint motion to dismiss. We disagree.

As previously mentioned, the trial court may consider periods of activity, intervals of inactivity, reasons for lack of attention, and the passage of time in determining whether a case should be dismissed for want of prosecution. *See Ozuna,* 766 S.W.2d at 902; *see also King,* 884 S.W.2d at 237. Furthermore, when there is an unreasonable delay in the prosecution of the case, it is presumed that the case has been abandoned unless the dismissed claimant provided a sufficient justification for the delay. *See Bilnoski,* 858 S.W.2d at 57; *Hosey,* 832 S.W.2d at 704.

Here, the record supports an implied finding that the case was not prosecuted with diligence. Nearly nine years elapsed between the date the case was first filed – December 31, 1990 – and the date the trial court finally dismissed it – November 17, 1999.[7] During that time, the parties engaged in some discovery and participated in mediation. *See Nichols v. Sedalco Constr. Servs.,* 228 S.W.3d 341, 343 (Tex.App.-Waco 2007, pet. denied) (holding that the trial court did not abuse its discretion in dismissing a

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[7] As noted earlier, the trial court did amend its dismissal order to include Fruit of the Loom as a defendant on January 31, 2000.

case for want of prosecution where brief periods of activity did not explain remaining long periods of inactivity). However, the parties neither resolved their claims nor agreed on a visiting judge to hear the case, as ordered by the trial court on June 24, 1993. At the November 17, 1999 hearing, counsel for the Lessards stated that the reason for the delay centered on his employment status. According to counsel for the Lessards, he initially represented the Lessards until he discontinued employment with his law firm for five years. He admitted to the trial court that his law firm "never did move the case" until he returned to work for the law firm after his five year hiatus.[8] Moreover, the Lessards did not file a request for a trial setting from the trial court until March 14, 1999.[9] The Lessards had an abundance of time with which to prosecute their claim, yet very little prosecution occurred in this case until it was it on the verge of being dismissed. We do not find the Lessards' justifications to be sufficient in explaining the nine-year delay in prosecuting the case. *See Ozuna,* 766 S.W.2d at 902; *King,* 884 S.W.2d at 237; *Bilnoski,* 858 S.W.2d at 57; *Hosey,* 832 S.W.2d at 704. We therefore conclude that the trial court did not abuse its

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[8] Counsel's admission is supported by the affidavit filed by Spagnoletti, where he blamed the delay on the complexity of the case (involving multiple plaintiffs and defendants) and the fact that the case had been handled by several associates at the law firm.

[9] The Lessards renewed their request for a trial setting at the November 17, 1999 hearing and in their motion to reinstate.

discretion in dismissing the Lessards' claims under its inherent authority. *See MacGregor,* 941 S.W.2d at 75; *Rotello,* 671 S.W.2d at 509. Accordingly, we overrule the Lessards' second issue.

B. The Trial Court's Denial of the Lessard's Motion for Reinstatement

In their first issue, the Lessards assert that the trial court abused its discretion in refusing to reinstate their claims pursuant to Rule 165a of the Texas Rules of Civil Procedure. *See* TEX.R. CIV. P. 165a. The Lessards argue that: (1) they were not consciously indifferent to the trial court's orders regarding the appointment of visiting judges; (2) they did not abuse the pretrial discovery process; (3) they showed the trial court that they were ready for trial; (4) their claims are meritorious and they should be given an opportunity to be heard; and (5) Velsicol did not demonstrate that it would be unfairly prejudiced by the reinstatement of the Lessard's lawsuit. Velsicol contends that the trial court did not abuse its discretion in denying the Lessard's motion for reinstatement because: (1) the Lessards ignored for six years the trial court's orders to agree on a visiting judge; and (2) the Lessards failed to provide Velsicol with discovery on a newly alleged medical claim. Velsicol argues that the Lessard's justifications for the delays – that the case originally involved numerous parties and the law firm representing the Lessards had reassigned the case to various

associates over the years – were not adequate to warrant a reinstatement of the case.

1. Standard of Review

Texas Rule of Civil Procedure 165a(3) sets out the procedure for reinstating cases dismissed for want of prosecution. *See* TEX.R. CIV. P. 165a(3). A trial court is compelled to reinstate a case "upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained." *Id.* In order to determine whether the trial court abused its discretion in refusing reinstatement, we review the entire record and determine whether the evidence was sufficient to find that the failure of the party was not due to accident, mistake, or other reasonable explanation. *See Tex. Dep't of Pub. Safety v. Deck,* 954 S.W.2d 108, 112 (Tex.App.-San Antonio 1997, no writ); *see also Torres v. Rios,* 869 S.W.2d 555, 557 (Tex.App.-Corpus Christi 1993, no writ). The party requesting reinstatement has the burden to bring forth a record establishing that reinstatement was required. *Kenley v. Quintana Petroleum Corp.,* 931 S.W.2d 318, 321 (Tex.App.-San Antonio 1996, writ denied).

2. Discussion

We have already determined that the record does not support a finding that the trial court abused its

discretion by dismissing the case. Moreover, the record supports an implied finding that the Lessards did not prosecute this case with diligence. *See Dueitt,* 180 S.W.3d at 741; *see also Luna v. UPS, Inc.,* No. 01-02-00144-CV, 2003 Tex.App. LEXIS 465, at ___ 8-9, 2003 WL 139592 (Tex.App.-Houston [1st Dist.] Jan. 9, 2003, pet. denied) (concluding that the trial court did not abuse its discretion in dismissing appellant's claims for failing to exercise diligence in prosecuting his claims and that the trial court did not abuse its discretion in denying appellant's motion to reinstate because of the dismissal). Therefore, the Lessards have failed to meet their burden to bring forth a record supporting reinstatement. We overrule the Lessards' first issue.[10]

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[10] We note that the record reflects that the trial court conducted a hearing on Velsicol's joint motion to dismiss rather than the Lessards' motion to reinstate. *See* TEX.R.CIV. P. 165a(3) (providing that a trial court is compelled to reinstate a case "upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained."). The supreme court has held that when a verified motion to reinstate has been filed under rule 165a(3), an oral hearing is required, and a failure to hold such a hearing requires reversal. *See Thordson v. City of Houston,* 815 S.W.2d 550, 550 (Tex.1991) (per curiam). However, the Lessards do not argue on appeal that they were improperly denied an oral hearing on their motion for reinstatement and, instead, rely on the evidence presented at the trial court's November 17, 1999 hearing on Velsicol's joint motion to dismiss. Furthermore, the Lessards, in their verified motion to reinstate, did not request a hearing on the motion. *See Keough v. Cyrus U.S.A., Inc.,* 204 S.W.3d 1, 6 n. 3 (Tex.App.-Houston [14th Dist.] 2006, pet. denied) (noting that before trial

(Continued on following page)

IV. CONCLUSION

We affirm the trial court's dismissal of the Lessards' claims for want of prosecution and its denial of the Lessards' motion to reinstate.

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court error can be found in the failure to set a hearing on a motion to reinstate, the movant must request a hearing); *Cabrera v. Cedarapids, Inc.*, 834 S.W.2d 615, 618 (Tex.App.-Houston [14th Dist.] 1992, writ denied) (same); *but see Matheson v. Am. Carbonics*, 867 S.W.2d 146, 147-48 (Tex.App.-Texarkana 1993, no writ) ("[T]he court is required to conduct a hearing on a timely filed motion to reinstate. Whether or not the movant requests a hearing on a motion to reinstate is irrelevant; a hearing is required unless waived.") (internal citations omitted). Moreover, the trial court, by providing the Lessards notice of and an opportunity to be heard at the November 17, 1999 hearing, afforded the Lessards with due process and, therefore, was not required to conduct a hearing on the Lessards' motion to reinstate. *See Dueitt v. Arrowhead Lakes Prop. Owners, Inc.*, 180 S.W.3d 733, 740-41 (Tex.App.-Waco 2005, pet. denied) (concluding that the trial court's failure to conduct a hearing on appellant's motion to reinstate was harmless error because appellants were provided due process in a prior hearing on appellee's motion to dismiss for want of prosecution).

CAUSE NO. 7205-C
(Consolidated)

MICHAEL JOSEPH LESSARD, DOROTHY ELAINE LESSARD, MONICA JEAN LESSARD, AND JEANNE MARIA LESSARD	§	**IN THE DISTRICT COURT OF LIVE OAK COUNTY, TEXAS**
VS.	§	
SAVAGE PEST CONTROL, LESLIE SAVAGE BOWLES, INDIVIDUALLY AND AS THE EXECUTOR OF THE ESTATE OF JAMES S. SAVAGE, DECEASED CHARLYE M. MERRITT, SAMMEY ALLISON MERRITT; THE UNKNOWN HEIRS OF JAMES S. SAVAGE; JAMES S. SAVAGE D/B/A SAVAGE PEST CONTROL, JAMES S. SAVAGE, DECEASED, THE ESTATE OF JAMES S. SAVAGE, SAVAGE PEST CONTROL, INC., ROBERT D. NOGUEIRA, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JAMES S. SAVAGE; AND VELSICOL CHEMICAL CORPORATION	§	**343RD JUDICIAL DISTRICT**

ORDER GRANTING JOINT MOTION TO DISMISS WITH PREJUDICE

(Filed Nov. 17, 1999)

CAME ON for consideration Defendants Charlye Ann Merritt; Sammey Allison Merritt; James S. Savage d/b/a Savage Pest Control; the Estate of James S. Savage, deceased; Savage Pest Control; Savage Pest Control, Inc.; Leslie Bowles; the unknown heirs of James S. Savage; and Velsicol Chemical Corporation on Joint Motion to Dismiss for Want of Prosecution the Claims of Plaintiffs, Michael Joseph Lessard, Dorothy Elaine Lessard, Monica Jean Lessard, and Jeanne Marie Lessard, and the Court, having heard this Joint Motion, is of the opinion that said Motion should be GRANTED.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the claims of Plaintiffs Michael Joseph Lessard, Dorothy Elaine Lessard, Monica Jean Lessard, and Jeanne Marie Lessard against Defendants Charlye Ann Merritt; Sammey Allison Merritt; James S. Savage d/b/a Savage Pest Control; the Estate of James S. Savage, deceased; Savage Pest Control; Savage Pest Control, Inc.; Leslie Bowles; the unknown heirs of James S. Savage; and Velsicol Chemical Corporation are **DISMISSED FOR WANT OF PROSECUTION**.

IT IS FURTHER ORDERED that costs are taxed against the Plaintiffs.

SIGNED on this 17th day of Nov., 1999.

/s/ Alonzo T. Rodriguez
Judge Presiding

[LOGO] OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

[POSTMARK SEP. 11, 2009]

RE: Case No. 09-0619
COA # 13-00-00113-CV
Style: MICHAEL JOSEPH LESSARD, DOROTHY ELAINE LESSARD, MONICA JEAN LESSARD AND JEANNE MARIA LESSARD
v. VELSICOL CHEMICAL CORP.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MAIL TO:

MR. JAMES T. LISTON
SPAGNOLETTI & CO
401 LOUISIANA 8TH FLOOR
HOUSTON TX 77002-1629

[LOGO]

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

[POSTMARK JAN. 15, 2010]

RE: Case No. 09-0619
COA # 13-00-00113-CV
Style: MICHAEL JOSEPH LESSARD, DOROTHY ELAINE LESSARD, MONICA JEAN LESSARD AND JEANNE MARIA LESSARD
v. VELSICOL CHEMICAL CORP.

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. (Justice Guzman not sitting)

MAIL TO:

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